IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 8TH JUNE 2007 / 18TH JYAISHTA 1929

WP(C).No. 2774 of 2007(E)
{E.P.NO.75/2002 OF THE PRINCIPAL SUB COURT,
IRINJALAKUDA}
.....

PETITIONER:

DEVASSY, AGED 51, S/O.KALLARAKKAL
KUNJIPAILOTH,
MURINGOOR VADAKKUMURY VILLAGE,DESOM,
MUKUNDAPURAM TALUK.

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT:

PAUL, S/O.PULLELI VAREED,
MURINGOOR VADAKKUMURY VILLAGE, DESOM,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT.

BY ADV. SRI.RENJITH THAMPAN
SMT.P.A.ANITHA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 08/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS:

EXT.P1: TRUE COPY OF THE E.P.NO.75/02 IN O.S.NO.369/05 DATED 13.3.02 ON THE FILE OF THE SUB COURT, IRINJALAKUDA.

EXT.P2: TRUE COPY OF THE E.A.NO.720/04 IN E.P.NO. 75/02 IN O.S.NO.369/05 ON THE FILE OF THE SUB COURT, IRINJALAKUDA DATED 28.3.04.

EXT.P3: TRUE COPY OF THE OBJECTIONS SUBMITTED BY THE RESPONDENT TO Ext.P2 APPLICATION DATED 23.7.04.

EXT.P4: TRUE COPY OF THE SUMMONS ISSUED BY THE SUB COURT, IRINJALAKUDA IN E.A.NO.127/06 IN E.P.NO.75/02 ON THE FILE OF THE SAID COURT DATED 21.1.06.

EXT.P5: TRUE COPY OF THE JUDGMENT IN W.P.(C) NO.9107/06 DATED 27.3.06.

EXT.P6: TRUE COPY OF THE RECEIPT DATED 29.3.06 FOR RS.60,000/-.

EXT.P7: TRUE COPY OF THE RECEIPT FOR PAYMENT OF RS.900/- DATED 20.7.06.

EXT.P8: TRUE COPY OF THE COMMON ORDER PASSED IN E.A.NO.592/06 AND E.A.NO.628/06 IN E.P.NO.75/02 IN O.S.369/05 DATED 18.12.06 PRINCIPAL SUB COURT, IRINJALAKUDA.

EXT.P9: TRUE COPY OF THE ORDER PASSED IN E.A.NO.127/06 IN E.P.NO.75/02 IN O.S.369/05 PRINCIPAL SUB COURT, IRINJALAKUDA DATED 18.12.06.

RESPONDENTS' EXHIBITS: NIL

//true copy//

P.S. To Judge

SK/-

M.N.KRISHNAN, J.

– –

W.P.(C) No.2774 of 2007 E

– –

Dated this the 8th day of June, 2007.

JUDGMENT

This writ petition is filed to quash the orders passed in Exts.P8 and P9. The writ petitioner is the judgment debtor in O.S.No.369/95 on the file of the Sub Court, Irinjalakuda.

2. The decree holder filed an application for execution of the decree and in the process of execution, the property was brought to sale and the decree holder purchased it and the sale was confirmed in his favour. Thereafter, the judgment debtor filed an application under Order XXI Rule 90 of the Code of Civil Procedure for setting aside the sale. Unfortunately, the said application was dismissed for default. Thereafter the present applications were filed to restore the earlier application. The present applications were also dismissed for default. The Executing Court found that the said court lacks jurisdiction to condone the delay under Section 5 of the Limitation Act, in the light of the authoritative pronouncement of the Supreme Court in ***Damodaran Pillai v. South Indian Bank Ltd.*** **{2005(4) K.L.T. 192}.**

3. Learned counsel for the writ petitioner would argue before me that a bare reading of Order XXI Rule 106 of the Code of Civil Procedure would show that the writ petitioner is entitled to file the application within 30 days from the date of knowledge of the order.

4. On the other hand, learned counsel for the decree holder relies on the judgment of the Apex Court. A perusal of the said judgment makes it crystally clear that the present case is squarely covered by the said decision. It was also a case where the party was represented through a counsel in an application to set aside the sale and it was dismissed for default in the presence of the lawyer and subsequent application for restoration of the said application, the Apex Court very clearly held that:

> "*if an order has been passed dismissing the application for default, the application for restoration thereof must be filed only within a period of 30 days from the date of the said order and not thereafter*."

5. In that view of the matter, the date when the decree holder acquired the knowledge of the order of dismissal of the execution petition was, therefore, wholly irrelevant. The Apex Court also held that:

> "When there is a specific order under Order XXI Rule 106 of the Code of Civil Procedure and there is no enabling provision in the same Code to extend the period of limitation, then the court may take protection under Section 5 of the Limitation act to condone the delay and it was held that Section 5 of the Limitation Act will be applicable in such cases".

So, in the light of this decision, it has to be held that the decision rendered by the learned Subordinate Judge, Irinjalakuda is perfectly in order and it does not call for any interference. Therefore, the writ petition is dismissed. However, if the parties want to settle the matter, it is exclusively within their jurisdiction to do the same.

Sd/-
(M.N.KRISHNAN)
JUDGE

sk/

//true copy//